

Meeting Date: June 8, 2021	Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111 AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE-SETTING PROCESS MEETING MINUTES	Page 1 of 7
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Committee Members Present

Captain Robert Carr, Committee Chair
 Captain Oscar Prada, Commissioner
 Karen Tynan, Commissioner

Committee Members Absent

None.

Board Staff Present

Allen Garfinkle, Executive Director
 Dennis Eagan, Board Counsel
 Brenda Pugh, Staff Services Manager I
 Alethea Wong, Administrative Assistant II

Identified Public Present

Captain John Carlier, San Francisco Bar Pilots (SFBP) President and Port Agent; Captain Anne McIntyre, SFBP Business Director; Captains Michael Rubino, and Zachary Kellerman, SFBP; Captain Einar Nyborg, Board Commissioner; Mike Jacob, Pacific Merchant Shipping Association (PMSA) Vice President and General Counsel; and John Schneider, Marathon Petroleum.

OPEN MEETING AGENDA

1. Call to Order and Roll Call. (Chair Carr)

Committee Chair Carr called the meeting to order at 1:30 p.m. Administrative Assistant II Wong called the roll and confirmed a quorum.

2. Review and approval of the minutes for the Ad Hoc Committee to Review the Pilotage Rate-setting Process meeting held on May 18, 2021. (Chair Carr)

Executive Director Garfinkle reported that the draft minutes for the Ad Hoc Committee to Review the Pilotage Rate-setting Process meeting held on May 18, 2021, are not available yet, but will be presented at the next Committee meeting.

3. Public comment on matters on the agenda or not on the agenda.

There were no public comments.

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4. **Identify, Discuss, and review various rate-setting options. The committee will draw from rate-setting methodologies in use in other jurisdictions, methodologies historically used in this jurisdiction, or a hybrid of both. The committee will evaluate each option based on feasibility of implementation and determine whether it meets with the objective of committee's mission within the established timeline goal. (Chair Carr)**

Committee Chair Carr summarized the following issues identified based on discussions from the meeting held on May 18, 2021:

- Both sides agree that the process involving the Legislature is difficult, and that recommendations have become politicized.
- The current process needs to be transparent and evidence based.
- He agreed with Mike Jacob who praised Executive Director Garfinkle and Assistant Director Cristia-Plant for making improvements to the Board's administrative programs providing the Board with continued credibility.
- Having an Administrative law judge involved in the process is a critical component of a future rate-setting process.
- Board can, and should be involved in the rate-setting process.

Commissioner Tynan had additional questions and concerns regarding the following:

- SFBP and industry members communicated that the Legislature does not want to be a part of the rate-setting process, and she requested some sort of verification or objective evidence of this position.
- Since having an Administrative law judge seems to be part of the solution, what is the expectation of an Administrative law judge process?
- It appears that there is legislative intent to have the Board involved in rate-setting.
- The process needs to be evidence-based and data-driven, and what is the role of benchmarking in the process?
- How often should the rate-setting process be undertaken?

Commissioner Prada had the following comments:

- He noted that the legislative process is cumbersome and doesn't seem to be working in trying to establish fair rates.
- Opined that the pension plan be considered part of the compensation package, noting that generally businesses offer a compensation package which includes taking into account pension benefits. He believes the pension should be a consideration in any rate process.
- What would be the role of the ALJ in the hearings?

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Committee Chair Carr noted that all three members of the committee seemed to agree that an ALJ be part of the process. He stated that the Committee needs to know more about the Administrative law judge, what is the level of involvement, and how the ALJ is provided.

Executive Director Garfinkle reported that he has no experience with the rate-setting process that involved an ALJ, but engaging an ALJ should be a simple process of the Board contracting for such assistance from the Office of Administrative Hearings (OAH). The Committee still has to decide what is the role of the ALJ. Board Counsel Eagan pointed out that there are various models that utilize an ALJ in the process, each with varying levels of ALJ involvement.

Commissioner Tynan requested more information on the Administrative law judge's role and whether they would be a final decision maker. Board Counsel Eagan stated that he was not aware of situations where the ALJ was the final decision maker, but added that he is not familiar with the PUC model and how an ALJ fits in with that process. Following up on Commissioner Tynan's question, Commissioner Carr inquired whether the ALJ would bring rate-setting expertise to the table. Board Counsel Eagan stated that it may be possible to obtain an ALJ with rate-setting experience, but more likely utilizing the same ALJ in several rate-setting proceedings would build up the desired expertise over time.

Mr. Jacob noted that the discussion and direction for the Committee seems right. He responded to a question by Commissioner Tynan on the role of the ALJ in Washington State, noting that the Administrative law judge makes the final recommendation that is either adopted formally by the Commission, or the Commission can reject the recommendation and do a "de novo" review on its own, using the findings developed by the ALJ. He noted that Hawaii's process also involves an ALJ, but there a state official, the Director of Consumer Affairs, that acts as an administrative review. He also noted that Washington state has a rate-setting process where an ALJ assisted in the developing the evidence record, but the final decisions were made by the Public Utility Commission Board. He also repeated his recommendation of the past, which was that the ALJ be obtained not from the OAH, but from the CPUC, as it is more likely that an ALJ from that organization will have rate-setting experience. He also noted that the California Public Utilities Commission will not volunteer to conduct an administrative hearing unless the Legislature requested them to.

Commissioner Tynan inquired of Mike Jacob about the burden of a protracted hearing process involving many motions, and how that was handled in Washington State. Mike Jacob noted that this was the first time through this new process in Washington and much of the motion practice was due to exploring the new process. He added that when you have

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fewer petitions you have a more stable environment, and noted that automatic adjusters within the rate can reduce the number of petitions and subsequent rate hearings.

SFBP Business Director Captain McIntyre reported that in Oregon, there are three separate pilot groups and the rate hearings were contentious. There the legislature moved the Board to Oregon PUC where there was rate-setting expertise. There was also an Administrative law judge from the Public Utilities Commission, who produced a recommendation for the Board, supported by the evidence. The Board members were present for the hearings and the hearings resulted with slight changes to the recommendations by the Commissioners due to the recession. She noted that the system in Oregon seemed to work well. There was a focus on pre-hearing processes that attempted to narrow the issues prior to the hearings. There they also attempted to remove large capital-intensive expenses from the process. To limit the frequency of the hearings, there was a limit set on how often a group could file for a rate adjustment. She confirmed that Oregon uses a target net income in the process, comparing that to a formula to project workload and is revised by a cost-of-living clause to add stability and longevity to the rate that is set.

Executive Director Garfinkle reported that there is a pre-hearing process built into our statutory process and that it has been used in the last two rate hearings.

Commissioner Tynan stated that she has concern that the Board gets ahead of itself without knowing how the Legislature feels about abdicating its role in the process. Executive Director Garfinkle admitted that he has not had any contact with legislators on this issue, but his observation is that if the Legislature were presented with a comprehensive rate-setting proposal that all the stakeholders were in agreement on, this would be enough to get them to agree to change the process.

Mr. Jacob confirmed that he has heard that the legislators are tired of hearing about contentious rate-setting and would rather the parties come to some agreement and present that to them. He added that as an institution, the Legislature might be glad that a large industry and a specific labor group has to come to them asking for something, but this is a question that should be explored. This adds the question of how a prospective proposal is viewed by the administration, because if the Legislature is not involved, then the question is who is, and does the administration want to be involved in rate-setting. He reiterated his point that when the rate-setting process is non-controversial, the current process can work and we have had successes in the past.

Captain McIntyre also confirmed that she has heard legislators say they don't want to be in the middle between industry and the pilots, and even when everyone agrees, it is still a cumbersome process and tied to the legislative timetable.

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The issue of how long an ALJ process might take and the estimates ran from two months to six months or longer.

Mike Jacob commented that the committee should be mindful how the rate-setting process is paid for and how fees are collected and from whom. The tariff in Washington had administrative costs built into the rate and it was capped at a set amount. He noted that industry would share the cost if fair and reasonable. He added that parties should bear their own cost. Commissioner Prada inquired what this process costs. Mr. Jacob speculated that the process cost approximately \$200k to \$300k, spread over three or four years.

Captain McIntyre noted that some thought should be given to how the recommendations that come out of this committee be presented to the legislature. Board Counsel Eagan commented that the chances of them passing a bill containing these recommendations would be greatly increased if there were a joint agreement between the industry and pilots. Following that, there needs to be an author who will present the recommendations to the Legislature, and the earliest effective date would be 2023. Commissioner Tynan inquired of Board Counsel Eagan on the statutory process, and whether the Harbors and Navigation Code would be amended. He responded that the statute could be amended, or, from a drafting standpoint, it may be better just to repeal the existing statute and replace it with new wording.

Executive Director Garfinkle noted that the previous rate-setting process was criticized for not being evidence based, hence the contentiousness when the bills were brought in Sacramento. He inquired of the Committee as to who they thought was qualified to make such a decision once the evidence has been presented by the parties? Board Counsel Eagan added that in recent previous rate hearings, the Board heard all the evidence, and based on the evidence, made a recommendation, accompanied by findings, which were presented to the Legislature. He noted that much of the controversy surrounding the findings were rooted in whether certain witnesses presented were competent to provide the evidence presented to the Board. He added that the Board is charged, by statute, with evaluating many factors, and there is a large measure of discretion afforded the Board as to how much weight to give each factor.

Commissioner Tynan stated that she has confidence in an Administrative law judge's ability to evaluate the evidence. Board Counsel Eagan shared Commissioner Tynan's vote of confidence in the pool of ALJ's.

Mr. Jacob commented that he was the source of the comments that the Board's decisions have been arbitrary and not based on evidence. He stressed that his criticism of the Board's

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previous rate decisions was substantive, and he queries whether the decisions were derivative of the evidence or was it coincidental with the fact that evidence was presented at a hearing. He believes it to be the latter. He believes that this does not happen when there is a formulaic approach, as was done in Washington or Oregon. The current process we have is sub-optimal in that it injects a layer of political activity prior to adoption of the rate. He feels that the Legislature does not have confidence in Board's rate-setting decisions, and he admits that this is a product of their lobbying.

SFBP Business Director Captain McIntyre commented that having an Administrative law judge may be beneficial, and will bring an objective standard to the process. It would add a neutral party to the process.

Mr. Jacob responded to Commissioner Prada that the Board's process will probably be similar to Washington's: having a petitioner present to the Board, and all parties having a chance at discovery, an objective independent third party making a decision with all stakeholders having an opportunity to voice their concerns. He would like to see a process that is objective, independent, third-party and arm's length. In his mind that would bring authenticity to the process.

SFBP Business Director Captain McIntyre commented they would like to see a process where an ALJ made a recommendation to the Board, and the Board then made a decision based on that recommendation. She stressed Commission involvement but with the ALJ playing a strong role.

Commissioner Carr stated that the Board has oversight over all aspects of the pilot's and this includes the rate-setting process and he feels that the Board needs to play a role in rate-setting as well.

Commissioner Tynan commented that the Committee stay focused on the Harbors and Navigation Code sections concerning rates and she is encouraged that the Committee has found some common ground to move forward on.

Mike Jacob suggested taking a closer look at Washington, Oregon, and Hawaii, as they all utilize an ALJ model, and evaluate the pros and cons of each system. Commissioner Carr agreed that all members appear to be amenable to utilizing an ALJ. It was agreed that stakeholders present would provide the Committee with materials on these other jurisdictions, particularly the statutes governing the process. Board Counsel Eagan noted that it would be helpful to see the decisions reached as well. Commissioner Tynan stated that she is trying to document the process as well, and having these materials would be helpful to that goal.

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Executive Director Garfinkle added that it has been mentioned that a formulaic approach would be helpful and he inquired of the Committee on how such a formula might be derived and what elements would the formula include.

5. Public comment on matters not on the agenda.

There were no public comments.

6. Schedule the next Committee meeting, and proposals for the next Committee meeting agenda.

Committee Chair Carr requested that the Committee meet again once Board staff have received relevant rate-setting process documents from other pilot organizations.

7. Adjournment.

MOTION: Commissioner Tynan moved to adjourn the meeting. Commissioner Prada seconded the motion.

VOTE: YES: Carr, Prada, and Tynan.

NO: None.

ABSTAIN: None.

ACTION: The motion was approved, and the meeting was adjourned at 3:37 p.m.

Submitted by:



Allen Garfinkle
Executive Director